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Supreme Court, U.S.
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No. (2)

In The
Supreme Court of the United States

KENNETH L. SMITH,
Petitioner,

v.

UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT, *et al.*,
Respondents,

KENNETH L. SMITH,
Petitioner,

v.

HON. MARY J. MULLARKEY, *et al.*,
Respondents,

Supplemental Appendix

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in propria persona
23636 Genesee Village Rd.
Golden, Colorado 80401
(303) 526-5451

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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in propria persona
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[The following document has been submitted pursuant to a deficiency letter dated October 16, 2007. As such, it will be timely filed if transmitted on or before December 14, 2007.]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[stamp dated Sep. 28, 2004]
Civil Case No. 04-RB-1222 (OES)

KENNETH L. SMITH,

Plaintiff,

v.

THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT,
THE JUDICIAL COUNCIL FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, HON. EDWARD W. NOTTINGHAM, in his personal capacity only,
HONS. MARY BECK BRISCOE, STEVEN H. ANDERSON, and JAMES E. BARRETT, in their personal capacities only,
HON. H. JEFFREY BAYLESS, both personally and in his representative capacity as the chief judge of the DISTRICT COURT, CITY AND COUNTY OF DENVER,
HON. KEN SALAZAR, in his personal capacity only, and JOHN DOES 1-99,

Defendants.

ORDER DENYING RECUSAL and
RECOMMENDATION FOR DENIAL OF WRIT OF
MANDAMUS, DENIAL OF PRELIMINARY
INJUNCTION AND FOR DISMISSAL OF ACTION

O. Edward Schlatter, United States Magistrate Judge

INTRODUCTION

Under the Order of Reference to United States Magistrate Judge issued in this matter pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Fed.R.Civ.P. 72(a) and (b), this case has been referred to me for purposes of ruling on nondispositive issues and making recommendations on any dispositive matters of this lawsuit. Pending before the court are plaintiff's Motion For Recusal Of Magistrate Judge Schlatter, Motion For Preliminary Injunction, and Motion For Writ Of Mandamus. Pursuant to D.C.COLO.LCivR 7.1C, the judicial officers of this court are not precluding from ruling on a motion at any time after it is filed.

The plaintiff's rights to seek review or reconsideration of the recommendation, by filing objections within ten days, are attached hereto, and are entitled "Advisement Under Fed. R. Civ. P. 72."

BACKGROUND

Plaintiff filed a 13-page Complaint on June 14, 2004. From a review of the pleading based on the motions filed by the plaintiff, this action appears to arise from the dismissal of plaintiff's lawsuit in Smith v. Mallarkey[sic], et al., Civil Action No. 00-N-2225 (D.Colo. 2000). The basis for the claims contained in plaintiff's suit in Civil Action No. 00-N-2225 included issues arising out of the denial of plaintiff's application for admission to the Bar of the State of Colorado. Pursuant to a Motion To Dismiss For Lack Of Subject Matter Jurisdiction And, Alternatively On Grounds Of Absolute Judicial And Quasi-Judicial Immunity, the Honorable Edward W. Nottingham dismissed the case based on three grounds: (1) this court lacked subject matter jurisdiction over the case, (2) the defendants were absolutely immune from the allegations concerning money damages, and plaintiff's pleading failed to state a claim upon which relief could be granted. See Id. at Docket #31. Plaintiff appealed the decision, and in an unpublished opinion, Judge Nottingham's ruling that the federal district court lacked subject matter jurisdiction over the action was affirmed. Id. at Docket #52. Plaintiff further sought review by the United States Supreme Court, Id. at Docket #53, but his petition was denied, Id. at Docket #56.

This lawsuit challenges the actions of various persons and entities in connection with the

proceedings in Civil Action No. 00-N-2225 and also an action filed in Colorado state court. Plaintiff's Complaint is less than a model of clarity, but does specifically delineate three claims for relief. The first claim seeks declaratory judgment under 42 U.S.C. § 1983 based on defendants alleged infringement of plaintiff's Constitutional rights. Plaintiff's Second Claim requests a writ of mandamus be entered by this court, compelling defendant Bayless "to do the job he is being paid to do, and has an indisputable duty to do: hear federal-law claims brought before him." The Third Claim For Relief seeks damages against the defendants under 42 U.S.C. § 1983 for the alleged violation of plaintiff's Constitutional rights.

On September 27, 2004, plaintiff filed the motions currently pending before the court. First, plaintiff seeks my recusal from the case because I served (and can be expected to serve) as the direct subordinate of Judge Edward W. Nottingham, one of the defendants in this case. Second, plaintiff seeks the issuance of a preliminary injunction, seeking to enjoin the continued operation and application of 10th Cir. R. 36. Third, plaintiff seeks the issuance of a writ of mandamus directing the Denver District Court to hear the case of Smith v. Mullarkey, et al., Case No. 02-CV-127.

DISCUSSION

I. Plaintiff's *Pro Se* Status

As a general rule, persons proceeding in this court pro se and untrained in the law are entitled to have their pleadings liberally construed. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). I take judicial notice[1] of the fact that the plaintiff in this case is a graduate of the University of Denver School of Law, that he graduated in the top quarter of his class, and that he passed both the Colorado Bar Examination and the MPRE. See, Smith, Civil Action No. 00-N-2225, Docket #5, FIRST AMENDED COMPLAINT AND JURY DEMAND. Plaintiff claims that he has been denied admission to the Bar of the State of Colorado based, at least in part, on his refusal to submit to a psychiatric examination. Id. His education, training, and legal abilities are not in question. Additionally, plaintiff is an experienced litigant, having previously represented himself in this court, in his appeal to the Tenth Circuit, and on petition to the United States

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[1] This Court may take judicial notice of court documents and matters of public record. See, e.g., Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996); Henson v. CSC Credit Services, 29 F.3d 280,v 284 (7th Cir. 1994); see, also, Southmark Prime Plus, L.P. v. Falzone, 776 F.Supp. 888, 892 (D.Del. 1991).

Supreme Court.

Accordingly, plaintiff's pleadings in this action are not entitled to the deferential or liberal construction standards afforded to pro se litigants who are untrained in the law.

II. Motion For Recusal.

The standard for impartiality under 28 U.S.C. § 455(a) is an objective one, requiring recusal only if "a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993) (citations omitted). In this case, recusal is not appropriate. Based on the facts in the plaintiff's recent motion, he has not demonstrated that a reasonable person would question my impartiality.

Plaintiff does not allege actual partiality on my part, nor has he shown an appearance of partiality. Plaintiff's entire argument centers around the fact that I serve as a Magistrate Judge in this District, making me a direct subordinate to the Article III Judges of this court, one of which he has named as a defendant in this action. Plaintiff ponders that "[n]o matter how Magistrate Schlatter might rule on a contentious issue, his impartiallity could reasonably be questioned." However, "adverse rulings cannot in themselves form the appropriate grounds for disqualification." Green v. Branson, 108 F.3d 1296, 1305 (10th Cir. 1997). Further, the provisions of Fed.R.Civ.P. 72 operate

as a "checks and balances" mechanism to counter the plaintiff's argument. Accordingly, plaintiff's motion seeking my recusal will be denied.

III. Motion For Writ Of Mandamus

A federal court may not issue a writ of mandamus directing state courts or their judicial officers in the performance of their duties. See Olson v. Hart, 965 F.2d 940, 942 (10th Cir. 1992). Accordingly, plaintiff's motion is legally frivolous, and should be denied.

IV. Motion For Preliminary Injunction

A party seeking a preliminary injunction must show: 1) a substantial likelihood that the movant eventually will prevail on the merits; 2) that the movant will suffer irreparable injury unless the injunction issues; 3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and; 4) that the injunction, if issued, would not be adverse to the public interest. Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980). Because injunctive relief is an extraordinary remedy, "the right to relief must be clear and unequivocal." Utah Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061, 1065-66 (10th Cir. 2001) (quotation omitted). A heightened burden applies to preliminary injunctions that would disturb the status quo, are mandatory as opposed to prohibitory, or provide the moving party with substantially all the relief

the party may recover after a full trial on the merits. *See* SCLC IFC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098-99 (10th Cir. 1991). In such instances, the moving party must show that the four factors listed above weigh heavily and compellingly in the movant's favor. Id.

A. Likelihood of prevailing on the merits.

Plaintiff posits that "[t]he question here isn't so much whether [he] should prevail but rather, one of how he can possibly lose." However, a moving party demonstrates a substantial likelihood of prevailing on the merits of their claim by presenting "a prima facie case showing a reasonable probability that it will ultimately be entitled to the relief sought." Autoskill, Inc. v. National Educational Support Systems, Inc., 994 F.2d 1476, 1487 (10th Cir. 1993).

In the portion of his Complaint entitled "Summary of the Case," plaintiff contends that 10th Cir. R. 36 is unconstitutional and that it's application to him violates his federal Constitutional rights. Plaintiff seeks to vindicate these rights through the remedial provisions of 42 U.S.C. § 1983. Plaintiff also contends that the International Covenant on Civil and Political Rights ("ICCPR") has been violated. See Smith, Civil Action No. 04-RB-1222, Docket #1, COMPLAINT, p. 4.

With regard to the ICCPR,

> [I]t is clear that the ICCPR is not binding on the federal courts. Courts in the United States are bound to give effect to international law and to international agreements, except that a non-self-executing agreement will not be given effect as law in the absence of necessary authority. When the Senate ratified the ICCPR, it specifically declared that the provisions thereof were not self-executing. And, since that time, Congress has never enacted implementing legislation for the ICCPR.

Hain v. Gibson, 287 F.3d 1224, 1243 (10th Cir. 2002) (quotations and citations omitted); see, also, Sosa v. Alvarez-Machain, 124 S.Ct. 2739, 2763 (2004) ("The United States ratified the [ICCPR] on the express understanding that it was not self-executing and so did not create obligations enforceable in the federal courts.").

Accordingly, the ICCPR cannot provide either a substantive or remedial basis for plaintiff's claims. Viewing the plaintiff's Complaint under § 1983, or otherwise, he also cannot prevail:

1. Plaintiff's First and Third Claims

In his First Claim For Relief, plaintiff alleges that:

> The continues enforcement and operation of 10th Cir. R. 36 will deny [plaintiff] an array

> of federal rights, . . . The continued enforcement and operation of 10th Cir. R. 36 infringes upon **every** right [plaintiff] might have under the Constitution of the United States and/or federal law -- to the extent that it delegates judicial enforcement of those rights ostensibly secured to him thereunder to the unfettered discretion of this Circuit's courts.

Smith, Civil Action No. 04-RB-1222, Docket #1, COMPLAINT, p. 10 (emphasis in original). Plaintiff's Third Claim For Relief seeks damages for the alleged infringement of his rights. Id. at p. 11.

As set forth in the Tenth Circuit Rules, 10th Cir. R. 36 provides:

> 36.1 **Orders and judgments.** The court does not write opinions in every case. The court may dispose of an appeal or petition without written opinion. Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent.
>
> 36.2 **Publication.** When the opinion of the district court, an administrative agency, or the Tax Court has been published, this

court ordinarily designates its disposition for publication. If the disposition is by order and judgment, the court will publish only the result of the appeal.

36.3 **Citation of unpublished opinions/orders and judgments**

(A) Not precedent. Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel.

(B) Reference. Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if:

(1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and

(2) it would assist the court in its disposition.

(C) Attach Copy. A copy of an unpublished decision must be attached to any document that cites it. If an unpublished decision is cited at oral argument, the citing party must provide a copy to the court and the other parties.

10th Cir. R. 36.

A review of plaintiff's Complaint, however, demonstrates that he has failed to allege a cognizable injury under the standing doctrine for his claims. As the Supreme Court has repeatedly stated, the "core" or "bedrock" elements of standing require that a plaintiff establish a (1) legally recognized injury, (2) caused by the named defendant that (3) is capable of legal or equitable redress. See, e.g., Raines v. Byrd, 521 U.S. 811, 818-19 (1997) (noting the "bedrock requirement" of standing generally and the "strict compliance" of showing a legally recognized injury specifically); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (identifying the three "core" component[s] of standing"). The party seeking to invoke the jurisdiction of the federal courts has the burden of alleging specific facts sufficient to satisfy these three elements. See Raines, 521 U.S. at 818 (plaintiffs must satisfy standing requirements "based on the complaint. . . .").

The injury that a plaintiff alleges must be unique to that plaintiff, one in which he has a "personal stake" in the outcome of litigation seeking to remedy that harm. See Raines, 521 U.S. at 818-19. In addition, the plaintiff must have sustained a "concrete" injury, "distinct and palpable . . . as opposed to merely abstract." Whitmore v. Arkansas, 496 U.S. 149, 155 (1990). The injury must have actually occurred or must occur imminently, hypothetical, speculative, or other "possible future" injuries do not count in the standing analysis.

See Id. Though these standing principles do not readily lend themselves to "mechanical application," Allen v. Wright, 468 U.S. 737, 751 (1984), nor do they require an "ingenious academic exercise in the conceivable," Lujan, 504 U.S. at 566.

In this case, there is little difficulty in applying these principles and concluding that plaintiff has failed to allege a legally cognizable injury, as required by the standing doctrine. First, his "throw everything up against the wall and see what sticks" style of alleging a violation of his rights not only contravenes the principles of notice pleading, but alleges no direct facts, or facts from which a reasonable inference could be drawn, of an injury-in-fact upon which to base standing in this case. Further, the harm that plaintiff describes in his Complaint deals only with the speculative loss of a plethora of rights because he feels the Tenth Circuit rule "virtually guarantee[s] a stunningly slipshod work product" and "empower[s] judges to write 'designer law' binding only upon the parties." Plaintiff's allegations do demonstrate his extreme dissatisfaction with the fact that the merits of his claims in Civil Action No. 00-N-2225 were not addressed. However, the Supreme Court's rulings in Rooker v. Fid. Trust Co., 263 U.S. 413, 415-16 (1923) and Dist. of Columbia Ct. of App. v. Feldman, 460 U.S. 462, 483 n. 16 (1983) were applied to his case and precluded review of plaintiff's claims, not the provisions of 10th Cir. R. 36. Smith, Civil Action No. 00-N-2225, Docket #52,

ORDER AND JUDGMENT issued by the Tenth Circuit. A written opinion was, in fact, issued by the Tenth Circuit and designated as unpublished. Id.

Notably, the constitutionality of Circuit Rules concerning unpublished opinions has been the subject of differing opinions among federal judges. See Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) (Ninth Circuit rule on citation of unpublished opinions constitutional); Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (Eighth Circuit rule on citation of unpublished opinions unconstitutional), *vacated as moot on rehearing en banc*, 235 F.3d 1054 (8th Cir. 2000)[2]; see, also,

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[2] Judge Arnold of the Court of Appeals for the Eighth Circuit authored an opinion which held that the Circuit's prohibition on the use of unpublished opinions was unconstitutional under Article III, because it allows judges to go beyond their "judicial power," when they issue opinions with no precedential value. See Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000). Nevertheless, the matter now remains an open question in that Circuit, since the ruling was later vacated as moot. See Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000). The Eighth Circuit's analysis on this issue has been soundly rejected. In the Ninth Circuit, th Circuit's similar prohibition was challenged by an attorney, who urged the court to rely on an unpublished opinion when deciding his case. Writing for the Ninth Circuit, Judge Kozinski found no support in Article III, or elsewhere in the Constitution, for the premise that

Symbol Techs., Inc. v. Lemelson Med., 277 F.3d 1361, 1366-68 (Fed.Cir. 2002) (rejecting Anastasoff and adopting Hart). However, unlike the litigants in Hart and Anastasoff, plaintiff has no discernible injury upon which to base standing to challenge

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the "judicial power" contains limitations which forbid judges from employing local rules that prohibit the use of unpublished opinions. Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001). Judge Kozinski held that the Ninth Circuit's rule was constitutional and also necessary to preserve principles of judicial economy in today's busy legal system. Id. at 1179-80. The Judge warned against reading such limitations into the judicial power, stating, "we should exercise considerable caution in recognizing those limitations, lest we freeze the law into the mold case in the eighteenth century." Id. at 1162.

the constitutionality of 10th Cir. R. 36.3. Plaintiff has demonstrated no unpublished case on point to his litigation which he has been precluded from citing as precedent, because of possible sanctions or other tangible harm (like in Hart), or that an unpublished but authoritative in-Circuit decision would be dispositive of the issue under litigation (as in Anastasoff). The opinion issued by the Tenth Circuit in plaintiff's appeal of 00-N-2225 is designated as an unpublished opinion, but no facts alleged by the plaintiff show an injury-in-fact arising from such a designation.

The Tenth Circuit written opinion clearly evidences the analysis and reasoning of the appellate court, and applies Supreme Court and Tenth Circuit precedent in affirming the District Court ruling. Plaintiff was not precluded from further appeal of the decision based upon its unpublished status. While plaintiff may feel that at sometime in the future this status may have an impact upon him, the Supreme Court has rejected the contention that an injury occurring "some day" can satisfy the injury-in-fact requirement of the standing doctrine. See Lujan, 504 U.S. at 564; see, also, Whitmore, 495 U.S. at 157.

In his Complaint and motion, plaintiff contends that he is raising a "reverse-*Anastasoff*" problem, in trying to get the courts to follow binding precedent of the United States Supreme Court and their respective jurisdictions. However, the Supreme Court has rejected any argument that a plaintiff

can establish standing solely on his or her interest in seeing the federal courts or other governmental bodies "perform their duties" and abide by the Constitution. See Whitmore, 495 U.S. at 160 ("'This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.'" (*quoting* Allen, 468 U.S. at 754); see, also, City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (asserting that a "federal court may not entertain a claim by any or all citizens who [do] nothing more than assert that certain practices of law enforcement . . . are unconstitutional.").

Under the allegations of his Complaint, and the arguments of his motion, plaintiff has alleged nothing more than an interest in what he feels is a problem concerning the rule in this Circuit governing disposition of cases without opinion or citation of unpublished opinions. That interest, unaccompanied by a showing that the application of the rule has somehow personally and actually harmed the plaintiff, cannot alone constitute the injury-in-fact contemplated by the standing doctrine. *Cf.* Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (A "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . ." (citation omitted)).

Because the plaintiff cannot demonstrate standing in this case, he cannot present a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief he seeks with regard to his first or third claims.

2. Plaintiff's Second Claim For Relief.

In his second claim, plaintiff seeks a writ of mandamus ordering defendant Bayless, Chief Judge of the District Court, City and County of Denver, to "do the job he is being paid to do." However, as noted with regard to plaintiff's Motion For Writ of Mandamus, a federal court may not issue a writ of mandamus to a state judge. See Olson, 965 F.2d at 942. Accordingly, plaintiff cannot prevail on the merits of his second claim.

3. Conclusion.

This court is without jurisdiction to consider plaintiff's second claim, and plaintiff lacks an injury-in-fact to establish standing for the remainder of his claims. Therefore, the likelihood of plaintiff's success on the claims he presents in his Complaint is not a factor which weighs in favor of the plaintiff.

B. Irreparable Injury.

Plaintiff's arguments concerning irreparable injury center around the mandamus relief he has requested against Judge Bayless and his dissatisfaction with the rulings he received in Civil Action No. 00-N-2225. Since this court is without power to

issue a writ of mandamus to Judge Bayless, and certainly has no power to reopen or revisit the ruling made by the Tenth Circuit on appeal in Civil Action No. 00-N-2225, plaintiff's arguments fail to demonstrate that he will be irreparably harmed if an injunction is not issued.

The injunction that is sought by defendant is exceptionally extraordinary in requesting that this court enjoin the application of a Circuit Rule governing policy and procedure. The issues of whether this court has authority to enjoin the application and operation of policies and procedures of a higher appellate court aside,[3] plaintiff has failed to present evidence that would warrant such extraordinary intervention by this court. Plaintiff clearly demonstrates his displeasure at the fact that his case in this court in Civil Action No. 00-N-

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[3] Cf. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943) (writ of mandamus has traditionally been used in federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."); see, also, Panko v. Rodak, 606 F.2d 168, 171 n. 6 (7th Cir. 1979) ("[I]t seems axiomatic that a lower court may not order the judges or officers of a higher court to take an action."); Nolan v. Judicial Council of the Third Circuit, 346 F.Supp. 500, 512-13 (D.N.J. 1972) (review of the actions of a judicial council by a district court would seem to "present serious incongruities and practical problems . . . .").

2225 was not decided on the merits; however, once again, review of his claims was barred by Supreme Court precedent (the very action plaintiff appears to argue for in this lawsuit), not by application or operation of the Circuit Court rules.

C. Balance of Harms

Plaintiff argues that issuance of the injunction would reduce cost, ultimately reduce the appellate court's workload and avoid the need for repetitive litigation. These are not harms personal to the plaintiff, but in which he could arguably contend that he has an interest as a member of the general public. However, the issuance of a preliminary injunction in this case would disturb the status quo, because it would interfere with the administration and operation of the court system under rules and procedures which have been in place prior to the date plaintiff began any litigation in this regard, and would provide the moving party with substantially all of the relief he would recover after full consideration on the merits. Accordingly the balance of harms does not weigh in plaintiff's favor.

D. Adversity To Public Interest

In sum, the plaintiff argues that the public interest is best served by enjoining of the application of 10th Cir. R. 36 because the public's right to a just and fair resolution overrides the efficient resolution of disputes that the rule may provide to

the courts. The flip side of plaintiff's statements that the public has a right to a fair and just resolution by holding the judiciary accountable, by not letting judges "play God," and by judges not issuing opinions merely having entertainment value are statements and observations made by Judge Kozinski in Hart:

> Cases decided by nonprecedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions. Writing a second, third or tenth opinion in the same area of the law, based on materially indistinguishable facts will, at best, clutter up the law books and databases with redundant and thus unhelpful authority. Yet once they are designated as precedent, they will have to be read and analyzed by lawyers researching the issue, materially increasing the costs to the client for absolutely no legitimate reason. Worse still, publishing redundant opinions will multiply significantly the number of inadvertent and unnecessary conflicts, because different opinion writers may use slightly different language to express the same idea.

Hart, 266 F.3d at 1179.

Further,

> *Anastasoff* suggests that the appointment of more judges would enable courts to write binding opinions in every case. See 223 F.3d at 904. We take no position as to whether there should be more federal judges, that being a policy question for Congress to decide. We note, however, that Congress would have to increase the number of judges by something like a factor of five to allocate to each judge a manageable number of opinions each year. But adding more judges, and more binding precedents, creates its own set of problems by significantly increasing the possibility of conflict within the same circuit as each judge will have an increased body of binding caselaw to consider and reconcile.

Id. at n.39[sic].

Both sides of the public interest in this regard are apparent, each with equal value. Accordingly, this factor does not weigh in favor of the plaintiff.

E. Conclusion.

In sum, the four factors for injunctive relief do not weigh heavily and compellingly in the plaintiff's favor. The alleged harm to the plaintiff does not outweigh the harm to the defendants and the interference with the public interest in the orderly and effective administration of the courts.

Moreover, plaintiff cannot show success on his claims. Accordingly, plaintiff's request for a preliminary injunction should be denied.

V. Viability Of Plaintiff's Complaint

Because the Complaint establishes, on its face, that this court lacks subject matter jurisdiction over plaintiff's second claim, the claim should be dismissed sua sponte. See Fed.R.Civ.P. 12(h)(3) ("[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); see, also, Tuck v. United Servs. Auto. Ass'n, 859 F.2d 842, 844 (10th Cir. 1988) (court has a duty to determine subject matter jurisdiction sua sponte). A court's lack of subject matter jurisdiction cannot be waived by the parties, nor can it be conferred upon the district court by agreement of the parties. Mitchell v. Maurer, 293 U.S. 237, 243 (1934).

Further, the Complaint establishes, on its face, that plaintiff cannot establish standing in this action and therefore has failed to state claims upon which relief can be granted with regard to his first and third claims. The Tenth Circuit has held that a district court may dismiss sua sponte a pro se complaint for failure to state a claim. McKinney v. Oklahoma, 925 F.2d 363, 365 (10th Cir. 1991).

It is true that the Supreme Court has at least parenthetically indicated that, generally speaking, a party cannot "aver[ ]" that it suffered

an injury in fact until it has reached "(the summary judgment stage)"; and that it cannot "prove[ ]" the standing elements until it has reached "(. . . the trial stage)." See Lujan, 504 U.S. at 561 (noting also that, "[a]t the general pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . ."). However, there is no authority indicating that the standing doctrine's injury requirement cannot be the proper basis for a dismissal for failure to state a claim. To the contrary, the Supreme Court decisions both preceding and following Lujan show that this injury element remains the proper basis of a dismissal under Fed.R.Civ.P. 12(b)(6). See, e.g., Raines, 521 U.S. at 817-24, 830 (vacating decision by district court that denied a motion to dismiss for failing to allege a cognizable injury under the standing doctrine); Whitmore, 495 U.S. at 158 (citing, with approval, Supreme Court precedents that sustained the dismissal of a case for lack of standing based on insufficient allegations of injury that appeared in the complaint (*citing among others* Ashcroft v. Mattis, 431 U.S. 171, 172 n.2 (1977); Allen, 468 U.S. at 745-48, 756 (examining allegations in class-action complaint and upholding district court's decision granting a motion to dismiss for want of standing); Lyons, 461 U.S. at 101-02, 105 (examining complaint's allegations of injury and finding them too speculative to satisfy the standing inquiry). Neither the Federal Rules of Civil Procedure nor the Constitution purport to

treat standing any differently from any other issue that a federal court might address at the pleading stage of a case.

I am aware that dismissing a Complaint without notice or opportunity to amend is proper only "when it is patently obvious that plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile." Curely v. Perry, 246 F.3d 1278, 1281-82 (10th Cir. 2001). In this action, it would be futile to allow an amendment. Plaintiff's Complaint fails to allege the factual basis for any injury or harm that could remotely approach the threshold requirement of having a personal, concrete, and actual or imminent injury, nor has plaintiff alleged any facts from which such a reasonable inference could be drawn. Plaintiff's allegations center around the fact that the claims he championed in this court in Civil Action No. 00-N-2225 were not reviewed on the merits; however, review was precluded on a jurisdictional bar and not the operation of 10th Cir. R. 36. Plaintiff claims great metaphysical injury arising out of the application and operation of 10th Cir. R. 36, but alleges no concrete injury upon which to base standing to bring this action.

Plaintiff has proceeded in this court on one set of facts of which he would have known, amounting to a choice made by the plaintiff, not excusable neglect. Plaintiff knew or should have known of the facts upon which any proposed

amendment regarding an injury could be based, but failed to include them in the original complaint. Pallottino v. City of Rio Rancho, 31 F.3d 1023, 1027 (10th Cir. 1994) (*quoting* State Distributors, Inc. v. Glenmore Distilleries, 738 F.2d 405, 416 (10th Cir. 1984) (citations omitted)).

Plaintiff cannot prevail on his first or third claim, and those claims should also be dismissed *sua sponte*. This, coupled with the lack of jurisdiction over plaintiff's second claim, warrants refusal of an opportunity to amend the Complaint, resulting in the complete dismissal of this action.

CONCLUSION

Based upon the foregoing, it is hereby **ORDERED** that plaintiff's Motion For Recusal Of Magistrate Judge Schlatter [Filed September 17, 2004; Docket #10] [sic] is **DENIED**.

Based on the Complaint on file herein, and the motions as made by the plaintiff, it is **RECOMMENDED** as follows:

1. Plaintiff's Motion For Writ Of Mandamus [Filed September 27, 2004; Docket #8] be **DENIED.**

2. Plaintiff's Motion For Preliminary Injunction [Filed September 27, 2004; Docket #9] be **DENIED.**
3. Plaintiff's Complaint [Filed June 14, 2004;

Docket #1] be **DISMISSED**, with prejudice.

Dated this _____ day of September, 2004 [original undated].

BY THE COURT:

/s/_____
O. Edward Schlatter
United States Magistrate Judge

[Fed. R. Civ. P. 72 notice elided for brevity]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
[stamp dated Sep. 28, 2004]

Civil Case No. 04-RB-1223 (OES)

KENNETH L. SMITH,

Plaintiff,

v.

HONS. MARY J. MULLARKEY,
REBECCA LOVE KOURLIS,
MICHAEL L. BENDER,
GREGORY J. HOBBS, JR.,
ALEX J. MARTINEZ,
NATHAN B. COATS, and
NANCY E. RICE, in their official capacities as
Justices of the Colorado Supreme Court,

Defendants.

RECOMMENDATION FOR DISMISSAL OF ACTION

O. Edward Schlatter, United States Magistrate Judge

INTRODUCTION

Under the Order of Reference to United States Magistrate Judge issued in this matter pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Fed.R.Civ.P. 72(a) and (b), this case has been referred to me for purposes of ruling on nondispositive issues and making recommendations on any dispositive matters of this lawsuit. The plaintiff's rights to seek review or reconsideration of the recommendation, by filing objections within ten days, are attached hereto, and are entitled "Advisement Under Fed. R. Civ. P. 72."

BACKGROUND

Plaintiff filed an 8-page Complaint on June 14, 2004. From a review of the pleading in preparation for pretrial case management, this action arises from the dismissal of plaintiff's lawsuit filed in Denver District Court, entitled Smith v. Mallarkey[sic], Case No. 02-CV-127. Plaintiff asserts that in the state court action, he alleged violation of his federal rights under 42 U.S.C. § 1983 and facial challenges to the constitutionality of Colo.R.Civ.P. 201, arising out of the summary denial of his 1996 application for admission to the Bar of the State of Colorado in Application of Smith, No. LX-24 (Colo. Jan. 13, 2000). According to the plaintiff, on April 9, 2004, Denver District

Judge H. Jeffrey Bayless entered an Order dismissing the Complaint in Case No. 02-CV-127. Plaintiff contends that Judge Bayless ignored state and federal precedent in his ruling, and that based upon the rules and practices of the state appellate courts, promulgated by the Colorado Supreme Court, his case received only "slipshod review" on appeal. Plaintiff particularly takes issue with the court's policy concerning unpublished opinions, which he attaches to his Complaint as Exhibit A.

The Complaint sets forth one claim for relief, seeking a declaratory judgment that the continued enforcement and operation of the rules and/or practices which have been "drafted, implemented, encouraged an sanctioned" by the defendants "infringes upon every right any citizen might have under the Constitution of the United States and/or federal law.

The Complaint establishes, on its face, that plaintiff has failed to state a claim upon which relief can be granted. The Tenth Circuit has held that a district court may dismiss sua sponte a pro se complaint for failure to state a claim. McKinney v. Oklahoma, 925 F.2d 363, 365 (10th Cir. 1991). Accordingly, this claim and the Complaint should be dismissed *sua sponte*.

DISCUSSION

I. Plaintiff's *Pro Se* Status

As a general rule, persons proceeding in this court pro se and untrained in the law are entitled to have their pleadings liberally construed. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). I take judicial notice[4] of the fact that the plaintiff in this case is a graduate of the University of Denver School of Law, that he graduated in the top quarter of his class, and that he passed both the Colorado Bar Examination and the MPRE. See, Smith, Civil Action No. 00-N-2225, Docket #5, FIRST AMENDED COMPLAINT AND JURY DEMAND. Plaintiff claims that he has been denied admission to the Bar of the State of Colorado based, at least in part, on his refusal to submit to a psychiatric examination. Id. His education, training, and legal abilities are not in question. Additionally, plaintiff is an experienced litigant, having previously represented himself in this court, in his appeal to the Tenth Circuit, and on petition to the United States

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[4] This Court may take judicial notice of court documents and matters of public record. See, e.g., Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996); Henson v. CSC Credit Services, 29 F.3d 280,v 284 (7th Cir. 1994); see, also, Southmark Prime Plus, L.P. v. Falzone, 776 F.Supp. 888, 892 (D.Del. 1991).

Supreme Court.

Accordingly, plaintiff's pleadings in this action are not entitled to the deferential or liberal construction standards afforded to *pro se* litigants who are untrained in the law.

II. Plaintiff's Complaint.

A review of plaintiff's Complaint demonstrates that he has failed to allege a cognizable injury under the standing doctrine for his claims. As the Supreme Court has repeatedly stated, the "core" or "bedrock" elements of standing require that a plaintiff establish a (1) legally recognized injury, (2) caused by the named defendant that (3) is capable of legal or equitable redress. See, e.g., Raines v. Byrd, 521 U.S. 811, 818-19 (1997) (noting the "bedrock requirement" of standing generally and the "strict compliance" of showing a legally recognized injury specifically); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (identifying the three "core" component[s] of standing"). The party seeking to invoke the jurisdiction of the federal courts has the burden of alleging specific facts sufficient to satisfy these three elements. See Raines, 521 U.S. at 818 (plaintiffs must satisfy standing requirements "based on the complaint. . . .").

The injury that a plaintiff alleges must be unique to that plaintiff, one in which he has a "personal stake" in the outcome of litigation seeking to remedy that harm. See Raines, 521 U.S. at 818-19.

In addition, the plaintiff must have sustained a "concrete" injury, "distinct and palpable . . . as opposed to merely abstract." Whitmore v. Arkansas, 496 U.S. 149, 155 (1990). The injury must have actually occurred or must occur imminently, hypothetical, speculative, or other "possible future" injuries do not count in the standing analysis. See Id. Though these standing principles do not readily lend themselves to "mechanical application," Allen v. Wright, 468 U.S. 737, 751 (1984), nor do they require an "ingenious academic exercise in the conceivable," Lujan, 504 U.S. at 566.

In this case, there is little difficulty in applying these principles and concluding that plaintiff has failed to allege a legally cognizable injury, as required by the standing doctrine. First, the Complaint alleges no direct facts, or facts from which a reasonable inference could be drawn, of an injury-in-fact upon which to base standing in this case. Further, the harm that plaintiff describes in his Complaint deals only with the speculative loss of a plethora of rights because he feels the defendants' rules and/or practices "empower[ ] judges to write 'designer law' binding upon only the parties, often bearing only accidental resemblance to the 'official' law of Colorado." However, plaintiff is barred "from seeking what in substance would be appellate review of the state judgment in an United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." Kiowa

Indian Tribe of Okla. v. Hoover, 150 F.3d 1163, 1169 (10th Cir. 1998) (quoting Johnson v. DeGrandy, 512 U.S. 997, 1005-06 (1994)).

Notably, the constitutionality of Circuit Rules concerning unpublished opinions has been the subject of differing opinions among federal judges. See Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) (Ninth Circuit rule on citation of unpublished opinions constitutional); Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (Eighth Circuit rule on citation of unpublished opinions unconstitutional), *vacated as moot on rehearing en banc*, 235 F.3d 1054 (8th Cir. 2000)[5]; see, also, Symbol

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[5] Judge Arnold of the Court of Appeals for the Eighth Circuit authored an opinion which held that the Circuit's prohibition on the use of unpublished opinions was unconstitutional under Article III, because it allows judges to go beyond their "judicial power," when they issue opinions with no precedential value. See Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000). Nevertheless, the matter now remains an open question in that Circuit, since the ruling was later vacated as moot. See Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000). The Eighth Circuit's analysis on this issue has been soundly rejected. In the Ninth Circuit, th Circuit's similar prohibition was challenged by an attorney, who urged the court to rely on an unpublished opinion when deciding his case. Writing for the Ninth Circuit, Judge Kozinski found no support in Article III, or elsewhere in the Constitution, for the premise that

Techs., Inc. v. Lemelson Med., 277 F.3d 1361, 1366-68 (Fed.Cir. 2002) (rejecting Anastasoff and adopting Hart). However, unlike the litigants in Hart and Anastasoff, plaintiff has no discernible injury upon which to base standing to challenge

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the "judicial power" contains limitations which forbid judges from employing local rules that prohibit the use of unpublished opinions. Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001). Judge Kozinski held that the Ninth Circuit's rule was constitutional and also necessary to preserve principles of judicial economy in today's busy legal system. Id. at 1179-80. The Judge warned against reading such limitations into the judicial power, stating, "we should exercise considerable caution in recognizing those limitations, lest we freeze the law into the mold case in the eighteenth century." Id. at 1162.

the constitutionality of 10th Cir. R. 36.3. Plaintiff has demonstrated no unpublished case on point to his litigation which he has been precluded from citing as precedent, because of possible sanctions or other tangible harm (like in Hart), or that an unpublished but authoritative in-Circuit decision would be dispositive of the issue under litigation (as in Anastasoff). The Supreme Court has rejected the contention that an injury occurring "some day" can satisfy the injury-in-fact requirement of the standing doctrine. See Lujan, 504 U.S. at 564; see, also, Whitmore, 495 U.S. at 157.

Plaintiff contends that his case differs from Anastasoff and Hart because he challenges the "appellate courts' rights to affirm judgments at clear variance with binding precedent in 'unpublished' opinions." However, the Supreme Court has rejected any argument that a plaintiff can establish standing solely on his or her interest in seeing the federal courts or other governmental bodies "perform their duties" and abide by the Constitution. See Whitmore, 495 U.S. at 160 ("'This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.'" (*quoting* Allen, 468 U.S. at 754); see, also, City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (asserting that a "federal court may not entertain a claim by any or all citizens who [do] nothing more than assert that certain practices of law enforcement . . . are

unconstitutional.").

Plaintiff has alleged nothing more than an interest in the problem concerning the defendants' rules and practices. That interest, unaccompanied by a showing that the application of the rule has somehow personally and actually harmed the plaintiff, cannot alone constitute the injury-in-fact contemplated by the standing doctrine. *Cf.* Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (A "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . ." (citation omitted)).

It is true that the Supreme Court has at least parenthetically indicated that, generally speaking, a party cannot "aver[ ]" that it suffered an injury in fact until it has reached "(the summary judgment stage)"; and that it cannot "prove[ ]" the standing elements until it has reached "(. . . the trial stage)." See Lujan, 504 U.S. at 561 (noting also that, "[a]t the general pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . ."). However, there is no authority indicating that the standing doctrine's injury requirement cannot be the proper basis for a dismissal for failure to state a claim. To the contrary, the Supreme Court decisions both preceding and following Lujan show that this injury element remains the proper basis of

a dismissal under Fed.R.Civ.P. 12(b)(6). See, e.g., Raines, 521 U.S. at 817-24, 830 (vacating decision by district court that denied a motion to dismiss for failing to allege a cognizable injury under the standing doctrine); Whitmore, 495 U.S. at 158 (citing, with approval, Supreme Court precedents that sustained the dismissal of a case for lack of standing based on insufficient allegations of injury that appeared in the complaint (*citing among others* Ashcroft v. Mattis, 431 U.S. 171, 172 n.2 (1977); Allen, 468 U.S. at 745-48, 756 (examining allegations in class-action complaint and upholding district court's decision granting a motion to dismiss for want of standing); Lyons, 461 U.S. at 101-02, 105 (examining complaint's allegations of injury and finding them too speculative to satisfy the standing inquiry). Neither the Federal Rules of Civil Procedure nor the Constitution purport to treat standing any differently from any other issue that a federal court might address at the pleading stage of a case.

I am aware that dismissing a Complaint without notice or opportunity to amend is proper only "when it is patently obvious that plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile." Curely v. Perry, 246 F.3d 1278, 1281-82 (10th Cir. 2001). In this action, it would be futile to allow an amendment. Plaintiff's Complaint fails to allege the factual basis for any injury or harm that could remotely approach the threshold require-

ment of having a personal, concrete, and actual or imminent injury, nor has plaintiff alleged any facts from which such a reasonable inference could be drawn. Plaintiff's allegations center around the fact that the claims he championed in this court in Civil Action No. 00-N-2225 were not reviewed on the merits; however, review was precluded on a jurisdictional bar and not the operation of 10th Cir. R. 36. Plaintiff claims great metaphysical injury arising out of the application and operation of 10th Cir. R. 36, but alleges no concrete injury upon which to base standing to bring this action.

Plaintiff has proceeded in this court on one set of facts of which he would have known, amounting to a choice made by the plaintiff, not excusable neglect. Plaintiff knew or should have known of the facts upon which any proposed amendment regarding an injury could be based, but failed to include them in the original complaint. Pallottino v. City of Rio Rancho, 31 F.3d 1023, 1027 (10th Cir. 1994) (*quoting* State Distributors, Inc. v. Glenmore Distilleries, 738 F.2d 405, 416 (10th Cir. 1984) (citations omitted)). Refusing the plaintiff an opportunity to amend his Complaint would be justified, and plaintiff's lawsuit should therefore be dismissed.

CONCLUSION

Based upon the foregoing, it is **RECOMMENDED** that the plaintiff's Complaint [Filed June 14, 2004; Docket #1] be **DISMISSED**, with prejudice.

Dated this 28th day of September, 2004.

BY THE COURT:

/s/_____
O. Edward Schlatter
United States Magistrate Judge

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

(No. 04-1468) [stamp: Filed May 8, 2007]

KENNETH L. SMITH,

Plaintiff-Appellant,

v.

UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT; THE JUDICIAL COUNCIL FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT; EDWARD W. NOTTINGHAM, District Judge, in his personal capacity only; HONORABLE MARY BECK BRISCOE, in personal capacity only; HONORABLE STEPHEN H. ANDERSON, in personal capacity only; HONORABLE JAMES E. BARRETT; HONORABLE H. JEFFREY BAYLESS, in personal capacity and in his representative capacity as the chief judge of the District Court, City and County of Denver; KEN SALAZAR, Honorable, in his personal capacity only, and John Does 1-99,

Defendants-Appellees.

(No. 04-1470)
KENNETH L. SMITH,

Plaintiff-Appellant,

v.

MARY J. MULLARKEY; REBECCA LOVE KOURLIS; MICHAEL L. BENDER; GREGORY J. HOBBS, JR.; ALEX J. MARTINEZ; NATHAN B. COATS; NANCY E. RICE, Hons. in their official capacities as Justices of the Colorado Supreme Court,

Defendants-Appellees.

Appeal from the United States District Court for the District of Colorado (D.C. Nos. 04-RB-1222(OES) and 04-RB-1223 (OES))

Submitted on the Briefs:*

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

Kenneth L. Smith, *pro se*

John W. Suthers, Attorney General; and Friedrick C. Haines, First Assistant Attorney General, State of Colorado, Denver Colorado, for Defendants-Appellees.

Before **HOLLOWAY**, **SEYMOUR**, and **BALDOCK**, Circuit Judges.

SEYMOUR, Circuit Judge.

Kenneth L. Smith appeals the district court's dismissal of two separate lawsuits stemming from the denial of his application for admission to the Colorado bar. The present litigation focuses on asserted deficiencies he alleges existed in the judicial process provided to him in his previous legal challenges. In particular, Mr. Smith objects to the resolution of cases by non-precedential unpublished decisions, a practice permitted by

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The cases aretherefore ordered submitted without oral argument.

procedural rules issued and enforced by the Colorado courts and by this circuit.[6] As explained below, we agree with the district court that neither of the cases under review can properly proceed in federal district court. We therefore affirm.

I

Background

Mr. Smith graduated from law school, passed the state bar examination, and passed the professional ethics examination, all prerequisites

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[6] Because the Tenth Circuit Court of Appeals, several circuit judges, and a district judge in the circuit are named defendants in the action challenging this court's publication practice, plaintiff has moved for recusal of all Tenth Circuitjudges and designation of a hearing panel from another circuit. Given "there are no pertinent, particularized allegations of bias," we apply our general rule that, notwithstanding the inclusion of Tenth Circuit judges in the caption, "neither this court nor this panel . . . is disqualified from hearing and resolving this case." *Switzer v. Coan*, 261 F.3d 985, 987 n.1 (10th Cir. 2001) (brackets, quotation marks and citations omitted). Indeed, it seems peculiarly unfitting for one circuit's procedural rules and practices to be governed by judges from another circuit. Such matters are, of course, subject to the judgment of the Supreme Court, which has wide-ranging authority through both case-specific review and its general supervisory power "to intervene to protect the integrity of the federal system." 32 Am. Jur. 2d *Federal Courts* § 473 (discussing authority regarding Supreme Court's supervisory power).

to obtaining a license to practice law in Colorado. When he was ordered to submit to a mental status examination by the Board of Law Examiners' Hearing Panel, however, he refused. Primarily because Mr. Smith refused to submit to that examination, the Hearing Panel recommended to the Colorado Supreme Court that his application be denied. After consideration of the record, including Mr. Smith's application, the Hearing Panel's report and recommendation, Mr. Smith's exceptions to that report, and the responses filed by the Board of Law Examiners, the Colorado Supreme Court denied the application for admission to the State Bar. Mr. Smith then filed an action in federal district court challenging the admission process on constitutional grounds. That action was dismissed pursuant to the *Rooker-Feldman* doctrine.[7] On appeal, this court affirmed in an unpublished Order and Judgment, *see Smith v. Mullarkey*, No. 02-1481, 2003 WL 21350579 (10th Cir. June 11, 2003), and denied Mr. Smith's request for a rehearing. Mr. Smith unsuccessfully

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[7] The *Rooker-Feldman* doctrine holds that under 28 U.S.C. § 1257, the only federal court with jurisdiction to review state court judgments is the Supreme Court. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005) (discussing *Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 482 (1983), and *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 414-16 (1923)).

sought a writ of mandamus and/or prohibition from the Supreme Court.

In the meantime, Mr. Smith challenged the bar admission process in state court on state and federal (42 U.S.C. § 1983) grounds. The state trial court summarily dismissed for lack of jurisdiction, citing the state supreme court's exclusive authority over matters pertaining to bar admissions. *See Colo. Sup. Ct. Grievance Comm. v. Dist. Ct.*, 850 P.2d 150, 152 (Colo. 1993) (en banc). The state trial court did not mention § 1983 or address whether the invoked jurisdictional limitation was a valid basis for denying enforcement of the federal rights involved. Mr. Smith appealed this decision to the Colorado Court of Appeals.

He subsequently filed the two actions currently before us. In the first, he sued the justices of the Colorado Supreme Court, challenging the state court's use of non-precedential unpublished decisions to dispose of appeals. He contends this creates a system "wherein [the Colorado] appellate courts are free to affirm irregular (and even flagrantly unconstitutional) decisions in unpublished opinions – while having no effect upon [the state's] 'official' published law." Rec. (Appeal No. 04-1470), vol. I, doc. 1 at 2. Specifically, he alleges the state trial court failed to follow controlling precedent, and the state's non-publication rules enable an affirmance of

that decision without legal accountability.[8] He argues the "continued enforcement and operation of these rules" would deny him various constitutional protections. *Id.* at 7.

In a separate action, Mr. Smith made similar allegations regarding this circuit's use of non-precedential decisions, citing our unpublished resolution of his first federal suit. *See* Rec. (Appeal No. 04-1468), vol. I, doc. 1 at 2-4, 6-9. He contends this practice violates the same rights he invoked in his challenge to the state practice, as well as the International Covenant on Civil and Political Rights. In addition to seeking relief with respect to this court's rules, he requested a writ of mandamus ordering the state trial judge to address the merits of his challenge to the state bar admission process. We address each of his claims in turn.

II

Challenge to State Court Non-Publication Practice

The district court invoked Article III and held that Mr. Smith lacked standing to challenge the

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[8] Mr. Smith does not claim 3 the state practice has prevented him from relying on any unpublished decisions supporting a favorable result in his case, which was the basis for a similar challenge to a federal non-publication rule in *Anastasoff v.United States*, 223 F.3d 898, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000).

state's non-publication practice. The fundamental requirements of standing are an injury in fact caused by the conduct complained of that will likely be redressed by a favorable decision in the case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court concluded that Mr. Smith could not relate the practice he challenges to any cognizable injury to himself. In its view, Mr. Smith "ha[d] alleged nothing more than an interest in the problem concerning the defendants' rules and practices [on publication]," and "[t]hat interest, unaccompanied by a showing that the application of the rule or practice has somehow personally and actually harmed the plaintiff, cannot alone constitute the injury-in-fact contemplated by the standing doctrine." Rec. (Appeal No. 04-1470), vol. I, doc. 8 at 7.

"Standing is determined as of the time the action is brought." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005). Mr. Smith had just taken his state appeal when he filed this action. He was in no position to challenge the adequacy of state appellate review in cases culminating in unpublished opinions unless he could show that he would in fact receive such review from the state court of appeals (and from the state supreme court as well, if it took the case on certiorari). As we have explained,

> an injury in fact must be actual or

> imminent, not conjectural or hypothetical. Allegations of possible future injury do not satisfy the requirements of Art[icle] III. A threatened injury must be certainly impending to constitute injury in fact. An Article III injury must be more than a possibility. The threat of injury must be both real and immediate.

Id. at 1155 (quotation marks, ellipses and citations omitted). Mr. Smith cannot make this required showing because the manner of resolution of his future appeals is entirely speculative.

Mr. Smith advances two alternative arguments for standing that we briefly address. Invoking the First Amendment and citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), he insists every citizen has standing to challenge judicial practices that render the law less certain, based on the chilling effect such uncertainty has on everyone's exercise of free speech rights. *Broadrick* recognized an exception to the traditional standing requirement of injury personal to the litigant when the litigant challenges a "statute[] *attempting to restrict or burden the exercise of First Amendment rights*," *id.* at 611 (emphasis added), permitting in those circumstances the assertion of a chilling effect on others' constitutionally protected speech to serve as a redressable injury. But the practice at issue

here is not directed at the exercise of First Amendment rights.

Mr. Smith contends the uncertainty produced by the use of non-precedential decisions could indirectly affect the exercise of First Amendment rights, asserting one might curtail speech for fear that subsequent litigation will result in an unpublished decision denying constitutional protection in a manner wildly inconsistent with what would have otherwise been decided in a published opinion. That contention is so speculative and riddled with assumptions that it cannot serve as the basis for standing even if the consideration of third-person injury were permissible here. *See Nova Health Sys.*, 416 F.3d at 1155 ("[A]n injury in fact must be actual or imminent, not conjectural or hypothetical."). Mr. Smith has not cited any authority applying *Broadrick*'s First Amendment standing analysis in similar circumstances, and we decline to take that step.

Mr. Smith also asks us to rely on the principle typically invoked in cases involving mootness that a dispute "capable of repetition, but evading review" can be heard despite the lack of a presently justiciable case or controversy. *See, e.g., Roe v. Wade*, 410 U.S. 113, 125 (1973). While the state courts' ongoing practice certainly satisfies the repetition requirement, there is no reason to think that the practice must evade review. If the state court of appeals decides a

case by unpublished opinion, the losing party can object by way of rehearing and/or certiorari review to the state supreme court, whose own practice in this regard may be reviewed by way of rehearing and/or certiorari review by the United States Supreme Court.

In sum, the district court correctly concluded that Mr. Smith lacked standing to challenge his mere anticipation of being affected by the state appellate courts' practice of issuing unpublished decisions. Indeed, we note that Mr. Smith's state appeal was eventually heard by the Colorado Supreme Court and resolved by published decision. *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (en banc), *cert. denied*, 126 S. Ct. 1792 (2006). We affirm the district court's order dismissing Mr. Smith's challenge to Colorado's non-publication practice.

III

Challenge to Federal Non-publication Practice

When Mr. Smith filed suit against the federal defendants, he had no litigation pending in the Tenth Circuit. The focus of his challenge to this court's use of unpublished decisions was the unfavorable disposition, by unpublished order and judgment, of his prior appeal regarding the constitutionality of the state bar admission process. The proper means for objecting to the non-publication of that decision would have been by petition for rehearing in this court and/or

petition for certiorari review by the Supreme Court.[9] Instead, he has sought our review of this prior action by generating an entirely new stream of litigation. Although it is possible that this present case could ultimately result in an unpublished decision, this mere possibility is too speculative to support jurisdiction under Article III. *Nova Health Sys.*, 416 F.3d at 1155; *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1282 (10th Cir. 2002); *Hutchinson v. Pfeil*, 211 F.3d 515, 520-21 (10th Cir. 2000). Thus, we conclude, neither a collateral challenge relating to Mr. Smith's prior unsuccessful appeal, nor an anticipatory challenge relating to a potential unpublished disposition in this litigation suffices to establish an actual injury that would permit review and redress. Accordingly, the district court properly dismissed Mr. Smith's claims for lack of standing.

We point out that the alleged injury caused by our circuit publication rules need not consistently evade review. Other circuits have addressed the

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[9] In fact, Mr. Smith filed a petition for rehearing in which he argued that this court had deviated from precedent in its decision and then stated, in passing, that "he ha[d] a right to insist that it do so in a published opinion with precedential value," *Smith v. Mullarkey*, No. 02-1481, Petition for Rehearing, at 1. He also noted the unpublished nature of this court's decision in the petition for mandamus and/or prohibition he filed in the Supreme Court. In neither instance, however, did he argue that the use of unpublished decisions was unconstitutional.

validity of their non-publication rules in cases where the question of the rule's validity arose *in the context of litigation presently before the court*. For example, courts have considered the constitutionality of publication rules where an unpublished decision relevant to the merits of an appeal was pressed by a litigant who insisted it be deemed binding precedent contrary to the circuit rule, *see Symbol Techs., Inc. v. Lemelson Med.*, 277 F.3d 1361, 1366-67 (Fed. Cir. 2002), or was opposed by a litigant who insisted it be disregarded pursuant to the circuit rule, *see Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). Such rules have also been scrutinized where an attorney violated a circuit rule prohibiting citation to non-precedential decisions and sought to avoid proposed disciplinary action by challenging the validity of the rule. *See Hart v. Massanari*, 266 F.3d 1155, 1159-60 (9th Cir. 2001). As demonstrated in these cases, a circuit non-publication rule may be challenged in the circuit court when application of the rule in a live proceeding before that court directly implicates the interest of a party or counsel in that proceeding. Such is not the case here.

IV

Mandamus Relief against State Trial Judge

The state trial court held it lacked jurisdiction to

consider constitutional claims stemming from the denial of Mr. Smith's admission to the bar because jurisdiction to hear such claims was lodged exclusively with the Colorado Supreme Court. Mr. Smith sought mandamus relief from the federal district court to compel the state trial judge's consideration of his constitutional claims. The district court summarily rejected his claim for lack of jurisdiction under *Olson v. Hart*, 965 F.2d 940, 942 (10th Cir. 1992), which held that "[f]ederal courts have no authority to issue a writ of mandamus to a state judge." Although he acknowledges this limitation on the authority of federal courts, Mr. Smith argues the district court erred in not construing his mandamus request as a claim for injunctive relief under 42 U.S.C. § 1983. *See Olson*, 965 F.2d at 943 ("We may also construe a pro se petition for a writ of mandamus as an action for . . . declaratory relief under 42 U.S.C. § 1983."). We noted in *Olson*, however, that "section 1983 injunctive relief is available" only if "appellant can show he was deprived of a federal right." *Id.*

In *Olson*, the plaintiff alleged the state court judge, out of spite, refused to sign a journal entry necessary to the exercise of his right to appeal. We held, if the allegation were true, the judge's arbitrary and capricious action would violate the plaintiff's due process rights and present a cognizable § 1983 claim. *Id.* Here, Mr. Smith has requested mandamus relief claiming that the

state trial court erred by limiting its jurisdiction in accordance with state law precedent, *see People v. Buckles*, 453 P.2d 404 (Colo. 1968); *Colo. Sup. Ct. Grievance Comm. v. Dist. Ct.*, 850 P.2d 150, 154 (Colo. 1993), and failing to consider claims that his denial of admission to the bar violated his constitutional rights. Although he contends the state court has refused to entertain his federal claims in violation of the Supremacy Clause, we note that the state courts have not shut their doors to federal claims but have simply restricted challenges to individual bar admission decisions to Colorado Supreme Court jurisdiction. Mr. Smith directs us to no precedent establishing that Colorado violated his federal rights by vesting exclusive jurisdiction of the regulation of lawyers in its Supreme Court. Accordingly, we decline to recast his request for mandamus as a § 1983 claim and we adhere to our general prohibition on issuing a writ of mandamus to a state court judge.

Based on the foregoing analysis, we hold that the district court properly dismissed all of the claims asserted in the actions consolidated in this appeal.[10] Finally, we **DENY** the several motions

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[10] There are vague and conclusory references in Mr. Smith's briefing to an asserted tort liability of defendant Salazar, former Colorado Attorney General. Neither these references nor the underlying pleadings in the case

that remain pending because none of them affects our analysis of either case or warrants relief in any collateral respect.

We **AFFIRM** the judgments of the district court.

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remotely establish the existence of a cognizable claim

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KENNETH L. SMITH,

(No. 04-1468)

Plaintiff-Appellant,

v.

UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT; THE JUDICIAL COUNCIL FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT; EDWARD W. NOTTINGHAM, District Judge, in his personal capacity only; HONORABLE MARY BECK BRISCOE, in personal capacity only; HONORABLE STEPHEN H. ANDERSON, in personal capacity only; HONORABLE JAMES E. BARRETT; HONORABLE H. JEFFREY BAYLESS, in personal capacity and in his representative capacity as the chief judge of the District Court, City and County of Denver; KEN SALAZAR, Honorable, in his personal capacity only, and John Does 1-99,

Defendants-Appellees.

KENNETH L. SMITH,

(No. 04-1470)

Plaintiff-Appellant,

v.

MARY J. MULLARKEY; REBECCA LOVE KOURLIS; MICHAEL L. BENDER; GREGORY J. HOBBS, JR.; ALEX J. MARTINEZ; NATHAN B. COATS; NANCY E. RICE, Hons. in their official capacities as Justices of the Colorado Supreme Court,

Defendants-Appellees.

ORDER
Filed July 11, 2007

Before, **HOLLOWAY, SEYMOUR,** and **BALDOCK,** Circuit Judges

Plaintiff-Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of

the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

By: /s/_____ (illegible)
Deputy Clerk